

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN CARLOS VERA,

Plaintiff,

v.

JAMES O'KEEFE III, an individual, and
HANNA GILES, an individual,

Defendants.

Civil No. 10-cv-1422-L(MDD)

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT [Doc. # 80] and
SETTING PRETRIAL
CONFERENCE DATE**

This action arises from Plaintiff Vera's allegation that Defendants O'Keefe and Giles secretly videotaped and recorded him at his place of work. On July 8, 2010, Plaintiff filed a complaint ("Complaint") in the United States District Court of the Southern District of California, alleging that Defendants violated the Invasion of Privacy Act, California Penal Code § 630, *et seq.* Although Defendant Giles is no longer a party to this action, [Doc. # 93.], Defendant O'Keefe joined in her motion for summary judgment on the Complaint. [Doc. # 80.] The motion has been fully briefed. [Doc. # 86.]

For the following reasons, the Court **DENIES** Defendant's motion for summary judgment.

1 **I. Background**

2 Plaintiff was an employee for ACORN in their National City, California office.
3 (Complaint ¶ 9.) ACORN was a community service organization that offered free services to the
4 public.¹ (See Vera Dep., Vol. I at 173:9-21.) Defendants hold themselves out as investigative
5 journalists and took on an assignment to record stories on ACORN offices in California.
6 (O’Keefe Dep. 73:2-10, 75:2-24.) Defendant O’Keefe testified that he recorded investigative
7 videos without obtaining permission from the person being recorded. (*Id.* at 39:9-21.)

8 On August 18, 2009, Defendants walked into the ACORN office under the pretense that
9 they wanted ACORN’s assistance in obtaining a loan for a house. (Vera Dep., Vol. I at 61:1-
10 62:14.) Defendant O’Keefe was wearing a hidden recording device on his tie and also used his
11 cell phone to record the audio when he walked into the ACORN office. (O’Keefe Dep. 90:5-14;
12 Complaint ¶ 11.) There were two other men in the office at that time: a man seeking ACORN
13 services, and David Lagstein, Plaintiff’s supervisor. (*Id.* at 68:8-25.) Plaintiff was speaking to
14 the client at the time Defendants entered and he asked Defendants to wait outside his office so he
15 could finish his conversation with the client, who left afterwards. (Vera Dep., Vol. I at 83:7-13.)
16 The parties engaged in a conversation, with most of it taking place in Plaintiff’s office. (See
17 Video 20:17:20-20:47:47.) Defendants told Plaintiff that they intended to fill the house with
18 underage girls working as prostitutes. (Transcript 10:13-20.) Additionally, they told Plaintiff that
19 they needed help filling out tax forms so the income from this illegal operation would appear
20 legitimate. (Vera Dep., Vol. I at 108:12-113:21.) At one point in the conversation, Defendants
21 asked Plaintiff whether the conversation was confidential and Plaintiff assured them that it was.
22 (Transcript 6:21-7:3; Complaint ¶ 14.) As the conversation progressed, the parties discussed the
23 possibility of Plaintiff helping Defendants smuggle the underage girls into the country to be used
24 as prostitutes. (Transcript at 114:20-128:13.)

25 Defendants left the ACORN office after approximately forty minutes. (Def.’s Motion
26 5:8.) Defendant Giles returned to the office to retrieve her sunglasses and resumed the

27
28 ¹The ACORN organization no longer exists.

1 conversation with Plaintiff in the hallway. (Vera Dep., Vol. I. at 101:9-21.) Soon after the
2 incident, Plaintiff contacted his cousin, a detective with the National City Police Department, to
3 report Defendants' illegal plan. (*Id.* at 136:6-12; 137:7-18.) Plaintiff's cousin forwarded the
4 report to San Diego Police Department. (*Id.*)

5 On September 9, 2009, Defendants released an edited videotape of the conversation they
6 had with Plaintiff on the Internet. (Def.'s Motion 6:24-25; 7:7-10.) Realizing Defendants' act
7 was a charade, Plaintiff told his cousin to disregard his earlier report regarding Defendants'
8 illegal plan. (Vera Dep., Vol. II at 221:10-224:9.) The edited video depicted Plaintiff as
9 conspiring to promote an underage prostitution business by agreeing to help Defendants file
10 fraudulent tax forms and smuggle underage girls from Mexico. In addition, Defendant O'Keefe
11 was seen in the edited video wearing his grandmother's chinchilla coat, his grandfather's "pimp
12 hat", and a cane from the Dollar Store. (O'Keefe Dep. 108:3-5, 110:5-13, 110:14-23.)

13 On September 17, 2009, Defendants' recording with Plaintiff was publicly broadcasted
14 for the first time. (Vera Dep., Vol. I at 187:7-13.) Later that day, Plaintiff and Lagstein appeared
15 at a press conference, where Lagstein defended Plaintiff's conduct with regard to the video.
16 (Lagstein Dep. 49:18-22.) After additional segments of the video came out, Lagstein retracted
17 his earlier support for Plaintiff. He released a press statement stating that "[a]fter release of the
18 second San Diego video by unscrupulous partisan videographers, we have reevaluated our
19 assessment of the incident that occurred last month. . . . [and] the video reflects unacceptable
20 conduct that contradicts the earlier statements of ACORN organizer Juan Carlos Vera."
21 (Lagstein Dep. 75:2-8.) Plaintiff's termination memo cited "organization issues and restructuring
22 related to illegal videotaping incident" as the reason for his termination. (Def.'s Motion 7:17-20,
23 Ex. 6.)

24 Plaintiff claims that the broadcast of the video publically humiliated him and caused him
25 physical, mental, and emotional pain and suffering. (Vera Dep., Vol. I at 180:9-181:19, 186:4-
26 190:2.) He has since been prescribed medication by his uncle for treatment. (*Id.* at 189:20-190-
27 15 Def.'s Motion Ex. 9.) Plaintiff claims that his reputation is "in the garbage" since the release
28

1 of the videotape and he has been unsuccessful finding employment after the ACORN incident.
2 (Vera Dep., Vol. I at 180:9-15; Def.'s Motion Ex. 9.)

3 On July 8, 2010, Plaintiff filed this action in the United States District Court, Southern
4 District of California in San Diego, California. He alleges that Defendants illegally recorded the
5 events that took place in the ACORN office, violating the Invasion of Privacy Act, Penal Code §
6 630, *et seq.* (Complaint ¶ 16-20.) On May 7, 2012, Defendant moved for summary judgment,
7 contending that he did not violate the Invasion of Privacy Act because Plaintiff did not have an
8 objectively reasonable expectation of privacy. (Doc. #80; Def.'s Motion 9:17-13:20.)

9 **II. Legal Standard for a Summary Judgment Motion**

10 Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates
11 the absence of a genuine issue of material fact and is entitled to judgment as a matter of law. *See*
12 Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material
13 when, under the governing substantive law, it could affect the outcome of the case. *Anderson v.*
14 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.
15 1997). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury
16 could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

17 A party seeking summary judgment always bears the initial burden of establishing the
18 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can
19 satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of
20 the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a
21 showing sufficient to establish an element essential to that party's case on which that party will
22 bear the burden of proof at trial. *Id.* at 322-23. “Disputes over irrelevant or unnecessary facts
23 will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
24 *Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

25 “The district court may limit its review to the documents submitted for the purpose of
26 summary judgment and those parts of the record specifically referenced therein.” *Carmen v. San*
27 *Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Therefore, the court is not
28 obligated “to scour the record in search of a genuine issue of triable fact.” *Keenan v. Allen*, 91

1 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251
 2 (7th Cir. 1995)). If the moving party fails to discharge this initial burden, summary judgment
 3 must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H.*
 4 *Kress & Co.*, 398 U.S. 144, 159-60 (1970).

5 If the moving party meets this initial burden, the nonmoving party cannot defeat summary
 6 judgment merely by demonstrating "that there is some metaphysical doubt as to the material
 7 facts." *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986);
 8 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence
 9 of a scintilla of evidence in support of the nonmoving party's position is not sufficient.") (citing
 10 *Anderson*, 477 U.S. at 242, 252). Rather, the nonmoving party must "go beyond the pleadings"
 11 and by "the depositions, answers to interrogatories, and admissions on file," designate "specific
 12 facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R.
 13 Civ. P. 56(e)).

14 When making this determination, the court must view all inferences drawn from the
 15 underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at
 16 587. "Credibility determinations, the weighing of evidence, and the drawing of legitimate
 17 inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on
 18 a motion for summary judgment." *Anderson*, 477 U.S. at 255.

19 **III. Discussion**

20 California Penal Code § 630, *et seq.* is part of California's invasion of privacy statutory
 21 scheme. It provides, in relevant part, that "[e]very person who, intentionally and without the
 22 consent of all parties to a confidential communication, by means of any electronic . . . device . . .
 23 records the confidential communication" violates the statute. CAL. PEN. CODE § 632(a).
 24 Accordingly, the three elements that Plaintiff must prove are (1) an electronic recording of (or
 25 eavesdropping on); (2) a "confidential" communication; and (3) all parties did not consent. *See*
 26 *Flanagan v. Flanagan*, 27 Cal.4th 766, 774-76 (2002). Penal Code § 637.2 authorizes a private
 27 civil right of action for any violation of § 632.
 28

1 For purposes of § 632, a “confidential communication” is “any communication carried on
2 in circumstances as may reasonably indicate that *any* party to the communication desires it to be
3 confined to the parties thereto,” but excludes communications made in “any other circumstance
4 in which the parties to the communication may reasonably expect that the communication may
5 be overheard or recorded.” Cal. Penal Code § 632 (emphasis added).

6 The threshold question is whether Plaintiff’s expectation that the communication between
7 Plaintiff and Defendants in the ACORN office was and would remain confidential was
8 objectively reasonable.² As the moving party, Defendant has the burden of either proving the
9 absence of this material fact, or demonstrating that Plaintiff has failed to make a sufficient
10 showing. *See Celotex*, 477 U.S. at 323. California courts have held that a reasonable expectation
11 of privacy may be a question of fact for the jury to decide when either party has been recorded
12 without his or her consent. *See Kight v. CashCall, Inc.* 200 Cal. App. 4th 1377, 1390.

13 In *Lieberman*, plaintiff, a physician, was secretly recorded at his office by undercover
14 reporters. *Lieberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 168 (2003). The
15 defendants subsequently broadcasted their story on plaintiff’s alleged illegal medical practice
16 and plaintiff sued for invasion of privacy. *Id.* The court found that it was “for the jury to decide
17 whether under the circumstances presented [plaintiff] could have reasonably expected that the
18 communications were private.” *Id.* at 169. In *Shulman*, the court found that a triable issue existed
19 as to whether Plaintiff had a reasonable expectation of privacy when she was inside a helicopter,
20 that served as an ambulance, while she was being rescued. *Shulman v. Group W Productions,*
21 *Inc.*, 18 Cal. 4th 200. But under clear circumstances, courts have found no genuine issue of
22 material fact with regards to confidentiality. In *Coulter v. Bank of America*, conversations
23 between plaintiff and bank employees were secretly recorded without their consent. 28 Cal. 4th
24 923, 924-25. Summary adjudication for the bank employees was found to be proper since
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26 ²Both parties address the issue of whether Plaintiff is entitled to damages. Specifically,
27 the parties dispute whether Plaintiff’s physical and emotional damage derive from the secret
28 recording itself or the broadcast of the recording. The Court finds it unnecessary to reach this
issue because Defendants have failed to cross the threshold issue and show that Plaintiff’s
expectation of privacy was objectively unreasonable.

1 “[e]ach of the employees involved submitted a declaration stating he or she believed the
2 conversations to be private, most were held in private offices with no one else present, and they
3 believed no one else was listening in on their conversations.” *Id.* at 929-30.

4 The nature of ACORN’s business as a community service provider does not preclude a
5 finding that communications within the office are confidential for purposes of this statute.
6 Defendants contend that “the fact that a workplace is open and publicly accessible can render
7 objectively unreasonable any expectation that a conversation held in the workplace is not being
8 overheard or recorded.” (Def.’s Motion 10:12-21.) They cite to *Davis v. Los Angeles West*
9 *Travelodge*, No. CV 08-8279, 2009 WL 4260406 at *2, for this proposition. In *Davis*, plaintiff
10 had recorded a conversation that took place at the clerk desk of a hotel lobby with defendant’s
11 employee. *Id.* at 2. The court found that defendant’s employee could not have reasonably
12 expected the conversation to remain confidential due to the location and circumstances of the
13 conversation. *Id.* The *Davis* court limited this finding to the facts of the case. *Id.*

14 The facts in this case are distinguishable from *Davis*. Unlike the conversation in *Davis*,
15 the majority of the communication between Plaintiff and Defendants were conducted inside
16 Plaintiff’s office, not in a common lobby. (See Video 20:17:20-20:47:47.) The relationship
17 between the parties went further than a generic relationship between a hotel desk clerk and a
18 customer. ACORN is in the business of providing counseling and support for the community on
19 various matters. (See Vera Dep., Vol. I at 173:9-21.) By its very nature, the organization handles
20 personal matters with individual clients. Defendants walked into ACORN and asked for
21 Plaintiff’s help with tax forms. (Vera Dep., Vol. I at 108:12-113:21.) Specifically, they solicited
22 his help with setting up an illegal prostitution business with underaged girls. (*Id.*; Complaint
23 ¶11.) Plaintiff, as a worker for an organization like ACORN, reasonably believed that the
24 content³ of the conversation was sensitive enough that it would remain private.

25
26 ³California courts have departed from the *O’Laskey* test and held that an expectation of a
27 confidential communication cannot be derived from the content of the communication for purposes of
28 this statute. See *Flanagan v. Flanagan*, 27 Cal. 4th 766, 774 (2002). The *Frio* test is now used when
determining whether a communication is confidential. See *Frio v. Superior Court* 203 Cal.App.3d 1480,
1488 (1988); *Flanagan*, 27 Cal. 4th 766, 774. Under this test, the aggrieved party has to show that they
had an objectively reasonable expectation of confidentiality based on the surrounding circumstances. *Id.*

1 Furthermore, the surrounding circumstances of the conversation support Plaintiff's belief
2 that the conversation was to remain confidential. Similar to the situation in *Lieberman*,
3 Defendants were posing as people seeking Plaintiff's assistance with their line of business. *See*
4 *Lieberman*, 110 Cal. App. 4th at 168. There were two other persons in the office when
5 Defendants walked in: Lagstein and a man who left shortly after Defendants' arrival. (Vera
6 Dep., Vol. I at 83:7-13.) Plaintiff had been engaging in a conversation with the man. (*Id.* at
7 88:15-16.) Plaintiff saw Defendants and said, "Please give me a moment, and go wait *outside*."
8 (emphasis added.) (*Id.*) A conversation held in Plaintiff's office in a normal tone of voice cannot
9 be overheard from outside his office. (Lagstein Dep. 113:16-21.) Plaintiff wanted his
10 conversation with the client to remain private and not overheard by Defendants by asking them
11 to wait outside.

12 When Defendants entered Plaintiff's office to speak with him, they wanted to know if he
13 could help with the purchase of a house, but did not immediately get into the details of their
14 scheme. Before Defendants went into the full details of their plan, they asked Plaintiff if the
15 conversation was going to remain private. (*See* Giles Dep. 117:13-16.)

16 [Defendant O'Keefe]: Wait, before

17 you... before you begin... can you... this is confidential, right?

18 [Plaintiff]: Yeah.

19 [Defendant O'Keefe]: Thank you. Alright.

20 [Defendant Giles]: So it's not being recorded or anything?

21 [Plaintiff]: No. [Unintel].

22 (Transcript 6:21-7:3.)

23 Defendant's purpose of asking this question was to deceive Plaintiff into thinking the
24 conversation was confidential. (Giles Dep. 118:5-8.) Defendants then divulged the details of

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27 The Court finds it appropriate to consider the content of the conversation as a factor when
28 making this determination, in addition to other surrounding circumstances.

1 their plan for nearly forty minutes. (Def.'s Motion 1:9-11.) At one point, the parties abruptly
2 paused their conversation when Lagstein briefly walked into Plaintiff's office, said a few words
3 to him, and quickly left. (Giles Dep. 106:3-13.) They waited for Lagstein to leave before
4 resuming. *Id.* Based on the surrounding circumstances, Plaintiff reasonably believed that the
5 conversation was private because it was held in his office with no one else present, and he
6 believed that no one else was listening in on his conversation. *See Coulter*, 28 Cal. 4th 923, 929-
7 30.

8 There is a genuine dispute as to a material fact in this case. Specifically, there is a genuine
9 dispute as to whether Plaintiff's expectation of privacy was reasonable. Defendants have failed
10 to meet their burden of proving the absence of this material fact, or demonstrating that Plaintiff
11 has failed to make a sufficient showing of expectation of privacy. *See Celotex*, 477 U.S. at 323.
12 Defendant O'Keefe testified that he had previously recorded investigative videos like this
13 without obtaining permission from the person being recorded. (O'Keefe Dep. 39:9-21.) He
14 misled Plaintiff to believe that the conversation would remain confidential by posing as a client
15 seeking services from ACORN and asking whether their conversation was confidential.
16 Defendants further affirmed the confidential nature of the conversation by asking Plaintiff
17 whether the conversation was recorded. (Complaint ¶ 14.) Summary judgment is improper here
18 because the evidence in this case is "such that a reasonable jury could return a verdict for the
19 [Plaintiff]." *See Anderson*, 477 U.S. at 248.


20 **IV. Conclusion & Order**

21 For the forgoing reasons, **IT IS ORDERED:**

- 22 1. Defendant's motion for summary judgment on the Complaint is **DENIED**; and
- 23 2. The final pretrial conference is set for **October 15, 2012 at 11:00 a.m.** The
24 proposed pretrial order shall be submitted on or before **October 1, 2012.**

25 **IT IS SO ORDERED.**

26 DATED: August 9, 2012

27 
28 M. James Lorenz
United States District Court Judge

1 COPY TO:

2 HON. MITCHELL D. DEMBIN
3 UNITED STATES MAGISTRATE JUDGE

4 ALL PARTIES/COUNSEL